

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,)	
)	
Plaintiff,)	
)	
v.)	Case No. 05-cv-329-GKF(PJC)
)	
TYSON FOODS, INC., et al.,)	
)	
Defendants.)	

**STATE OF OKLAHOMA'S MOTION TO COMPEL
GEORGE'S, INC. AND GEORGE'S FARMS, INC. TO RESPOND
TO DISCOVERY SEEKING FINANCIAL INFORMATION**

Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma and Oklahoma Secretary of the Environment J.D. Strong, in his capacity as the Trustee for Natural Resources for the State of Oklahoma ("the State") respectfully move to compel George's, Inc. and George's Farms, Inc. ("George's") to respond to discovery regarding their financial condition.¹

I. Introduction

In the Second Amended Complaint, the State specifically seeks relief in the form of "[p]unitive and exemplary damages, to the maximum extent allowed under the law." DKT #1215, p. 35. Under Oklahoma law, "financial condition" of a defendant is an element of analysis in awarding punitive damages. *See* 23 Okla. Stat. § 9.1. On July 10, 2006, the State served discovery seeking information regarding George's financial condition. To date, George's produced only compiled balance sheets and limited income information, but it has not produced

¹ Pursuant to LCvR 37.1, counsel have met and conferred on the issues set forth in this motion, but have been unable to reach an agreement.

other financial information the State requested. The State is entitled to production of the requested information.

II. Factual Background

In its July 10, 2006 requests for production, the State requested information regarding the George's net worth, and it objected to this request, claiming the information was irrelevant and confidential.

Request for Production #107: Please produce all documents and materials reflecting, referring to or relating to your net worth.

Answer: George's objects to this request as it includes within its scope documents which are neither relevant, nor will they lead to the discovery of admissible evidence. George's objects to this request as it includes documents within its scope which are protected from disclosure as confidential business information. Without waiving the foregoing objections and the General Objections, George's will produce a copy of its current balance sheet if directed to do so by the Court, and in accordance with the terms of a Confidentiality Order once one is entered by the Court in this case.

Ex. A.

The State served another request for production regarding George's financial condition in its September 13, 2007 Requests for Production, and it again objected and failed to produce any responsive information.

Request for Production #11: To the extent you have not already produced them, please produce copies of documents reflecting your financial statements for fiscal years 2002 to the present, as well as any other documents reflecting your net worth for fiscal years 2002 to the present. For purposes of this request for production, the term "financial statement" includes, but is not necessarily limited to, balance sheets, statements of income, statements of equity position, statements of cash flow, and all footnotes.

Response: Objection. George's is a privately held company and its financial statements are treated a confidential. This information is proprietary, privileged and is also confidential business/financial information not subject to disclosure. Moreover, the information is not organized by watershed, and so disclosure of the information would provide financial information for operations not located in the IRW and therefore not relevant or discoverable.

Ex. B.

In its continued effort to obtain responsive documents, in a letter dated October 24, 2008, the State provided George's with a list of seven specific types of financial documents it was seeking in regard to these two discovery requests. *See* Ex. C. On November 12, 2008, counsel for George's and the State met and conferred regarding these discovery requests. Counsel for the State again articulated the information sought in the discovery requests. George's agreed to produce information, and the parties agreed the State would then advise counsel for George's if additional information was needed.² On December 9, 2008, *almost two weeks after the date the parties agreed upon for production of the information*, George's finally produced extremely limited financial information. George's produced only compiled balance sheets; it did not produce complete financial statements. As David Payne, the State's expert who reviewed these statements explains, George's "did not produce audited or GAAP basis financial statements ("GAAP Statements") with informative footnote disclosures. Rather, GI [George's] commissioned from its outside accountants/auditors 'compiled balance sheet only' partial presentations which omitted all footnote disclosures for the purpose of this litigation. Furthermore, each of the compiled balance sheets George's produced did not ever consolidate the assets and liabilities of [the George's] subsidiaries." *See* Ex. D [Payne Report], p. 3-4.³ Each

² George's counsel disagrees with the State's counsel's understanding of the agreement that was reached during the initial meet and confer conversation. However, regardless of the particulars of the oral agreement and the parties' varied understanding of that agreement, after George's initial production of balance sheets, the State made clear in written correspondence the reasons why the initial production was inadequate and again requested complete financial statements and the corresponding notes. *See* Ex. F. (email exchanges between counsel).

³ Because of the confidential nature of the information contained in the report, a copy of this exhibit will be provided to the Court under separate cover for an *in camera* review pursuant to Paragraph 6 of the Confidentiality Order (DKT# 985).

of the compiled balance sheets included a cover letter that contained the following disclaimer regarding the incomplete nature of the information:

[George's] Management has elected to omit substantially all of the disclosures required by generally accepted accounting principles. If the omitted disclosures were included in the balance sheet, they might influence the user's conclusions about the Company's financial position. Accordingly, this balance sheet is not designed for those who are not informed about such matters.

Ex. E.⁴

On December 9, 2008 counsel for the State wrote counsel for George's requesting the omitted disclosures, and counsel for George's responded that contrary to the plain meaning of the disclaimer, that the information in the notes was not pertinent to the information in the balance sheet. *See* Ex. F (Email dated 12/9/08). On December 11, 2009, counsel for the State reiterated the request for complete financial statements which would include income information, cash flow information, and the notes that are an integral part of the balance sheets. *See* Ex. F (Xidis email to Graves 12/9/2008). After extensive and tedious correspondence with counsel for George's, counsel for George's informed the State on December 16, 2008 that he would consider producing "income/expense information" but that he would not produce cash flow information or auditor's notes. On December 24, 2008, counsel for George's advised that he would produce "income/expense information going back 5 years." On January 5, 2008 – the same day David Payne's expert reports were due – incomplete income/expense information was delivered to counsel for the State.

⁴ Because of the confidential nature of the information contained in this document, a copy of this exhibit will be provided to the Court under separate cover for an *in camera* review pursuant to Paragraph 6 of the Confidentiality Order (DKT #985).

III. Argument

The discovery regarding the George's Defendants net worth and corresponding financial documents is relevant to the State's claim for punitive damages, and their objections are without merit. In its written responses to this discovery and in the correspondence with counsel, counsel for the George's Defendants objected to the State's discovery regarding its financial condition on the baseless claim that this information is irrelevant. This assertion is baseless. One of the seven factors for a jury to consider in evaluating punitive damages under Oklahoma law is "[t]he financial condition of the defendant." 23 Okl. St. Ann. § 9.1. This Court has repeatedly held that discovery regarding a defendant's financial condition and net worth is appropriate when a claim for punitive damages has been made. *See, e.g., Hightower v. Heritage Academy of Tulsa, Inc.*, 2008 WL 2937227 (N.D. Okla. July 29, 2008) ("Financial records are discoverable when punitive damages are at issue"); *American Benefit Life Ins. Co. v. Ille*, 87 F.R.D. 540, 542 (N.D. Okla. 1978) ("It is well settled in Oklahoma that in an action wherein punitive damages are proper, evidence of the financial worth of the defendant is competent and admissible."). In the *City of Tulsa* case, this Court held that "[i]t would appear that *financial statements* reflecting the Defendants' net worth from 1996 forward would be sufficient for the Plaintiffs' needs. . . . This order is without prejudice to Plaintiffs' re-urging the motion *should additional financial information be necessary* as the case progresses." *See* Ex. G, p. 6 (emphasis added). The full financial statements that the State has repeatedly requested, including information regarding cash flow, and the notes that are "integral" to the financial statements, are obviously relevant evidence regarding George's financial condition, a key element in the punitive damages analysis. Moreover, recent tax returns are also relevant to this analysis in that they are the data used and

relied upon to prepare the financial statements and contain additional information that demonstrate how certain debt obligations are treated among related entities. *See* Ex. H ¶¶ 10-11.

The State's expert who will testify about the financial conditions of the defendants, David Payne, drafted reports providing as much analysis as possible with the limited information produced in the consolidated balance sheets, and that report was timely disclosed to the George's Defendants on January 5, 2009.⁵ However, as explained in his report, and his affidavit, the information requested by the State is important and relevant information for a fuller analysis. *See* Ex. D and H. As Mr. Payne explains in his affidavit, "GAAP [financial] Statements, Footnote Disclosures, and Consolidating Data are relevant to evaluating the financial condition, net worth and/or Ability to Pay of the Defendants." *See* Ex. H, ¶ 10. Although the balance sheets produced by George's contain some limited information about net worth (but not the integral notes to accompany these numbers), they do not include important information about George's income or its cash flow. The income and cash flow of a defendant are important elements to understanding the true nature of a company's financial condition. As Mr. Payne explains in his affidavit, "[t]he starting point for assessing the Financial Attributes affecting financial condition involves an evaluation of data as reported by the Defendants in their books, records, and financial statements ("Book Values"). Ability to Pay also considers true economic or intrinsic value ("Economic Value"), normalized earnings, and discretionary cash flows ("Earning Capacity") under the control of the managements for the Defendants." *See* Ex. H, ¶ 4. With only a balance sheet, a company's net worth is stated, but net worth alone is not necessarily

⁵ Since the George's Defendants did not produce the income/expense information until January 5, 2009, the same date as the expert report deadline, David Payne did not have an opportunity to review that information prior to the deadline. It has since been provided to him and the State will be seeking leave to supplement Payne's report on the George's Defendants with this information.

a full picture of a company's financial condition. The level of a company's income is a driving element of whether there is real or intrinsic value above the book value stated in a balance sheet. Moreover, complete tax returns also provide information relevant to evaluating financial condition by showing how a company treats debt obligations and distributes income. *See, e.g.,* Ex. H, ¶¶ 10-11.

While several years ago one might have argued that production of anything more than a current balance sheet is not relevant to the evaluation of a company's financial condition, the playing field has been altered by today's economy. A balance sheet is nothing more than a snapshot in time of a company's net worth on a given day. In today's volatile economy, the net worth of a company can fluctuate considerably in a very short period of time. Therefore, a more in-depth analysis is needed to determine a full picture of financial condition of any given company. The State cannot imagine that George's or any other defendant in this matter would want anything but the most thorough and up-to-date analysis of their financial conditions presented to the jury.

Complete financial statements should be readily available for George's. As Mr. Payne explains, "[b]ased upon my training and experience with privately held companies [like George's] GAAP Statements and Footnote Disclosures are generally prepared and are available in the ordinary course of business due to Stakeholder Requirements." *See* Ex. H, ¶ 8.

George's objections regarding confidentiality of the requested materials are without merit. This argument ignores the November 2006 confidentiality order the Court entered in this case that provides protection for sensitive business information. *See* DKT # 985. The confidentiality order provided methods for protecting confidential business information. Specifically, the order provides for a "Confidential" designation that protects designated

documents from disclosure to third parties except for preparation of the case, and a "Confidential: Attorneys' Eyes Only" designation that protects designated information from disclosure to third parties as well as a further level of protection for Defendants from each other, since they are competitors in the same industry. *See* DKT# 985, pp. 2-6. The confidentiality order provides more than adequate protection for the relevant information the State is requesting about George's financial condition.

With George's having no valid objections to the requested discovery, the State requests that the Court order George's to provide the following documents that are responsive to the State's requests for production: Complete financial statements for each of the George's defendants, including information about income and cash flow for calendar years ending in 2003-2008 and all corresponding notes for these financial statements, and complete filed tax returns for 2006 and 2007 (including all supporting schedules, disclosures, and detailed appreciation schedules)..

IV. Conclusion

For the reasons stated herein, the Court should order George's to respond to the State's requests for information pertaining to its financial condition and to provide the specific documents delineated herein. Because this information is readily available to George's and these requests have been outstanding for a very long time, the State requests that George's be requested to produce these materials immediately. The State's expert, David Payne, will need to review these documents upon receipt of them from George's. The State anticipates it will be requesting leave to supplement Mr. Payne's expert report once he has had an opportunity to review this information.

Respectfully Submitted,

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